NO. 48034-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANK WALLMULLER
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's guilty plea was not knowing, voluntary and intelligent, in violation of due process.

2. The court abused its discretion in denying appellant's motion to withdraw his guilty plea.

a. "The defendant has failed to demonstrate that withdrawal is necessary to correct a manifest injustice." CP 238, 266.

b. "The defendant's plea was entered knowingly, intelligently, and voluntarily. " CP 238, 266.

3. Appellant was denied his due process right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Due process requires a guilty plea to be knowing, voluntary, and intelligent. The trial court answered the question for Wallmuller regarding if his plea was voluntary. Must appellant be allowed to withdraw his plea because the court did not let him answer the question about voluntariness but shoes to speak on appellant's behalf?

2. Did the trial court abuse its discretion by applying the

wrong law to Appellant's motion to withdraw his appeal, CrR 4.2 rather than the correct CrR 7.8?

3. Was appellant denied effective assistance of counsel by his attorney's failure to investigate, and consider mounting defense to the charges?

B. STATEMENT OF THE CASE

a. Plea.

On June 3, 2014 Wallmuller pleaded guilty to the charges. RP 42 (June 3, 2014); CP 431. In his "Statement of Defendant on Plea of Guilty to Sex Offense (Felony)," Wallmuller asserted "that the court may review the police reports and/or a statement of probable cause supplied by the prosecutor to establish a factual basis for the plea which the court did." CP 431; RP 42 (June 3, 2014). Wallmuller acknowledged that he had the opportunity to discuss his case and options with his attorney and that his lawyer had explained to him, "and we have fully discussed," his Statement of Defendant on Plea of Guilty. RP 32-34(June 3, 2014) ; CP 431. In the same document, Wallmuller confirmed that he also understood his standard range was 240-318 months on count I, 120 months on count II, that the community custody range was life for count I and 36 months for count II, and that the maximum

term and fine for the respective offenses were life and $50,000 for count I and 10 years and $20,000 for count II. CP 431. He also acknowledged that "(n)o person has made promises of any kind to cause me to enter this plea except as set forth in this statement and that the prosecuting attorney would make the following recommendation to the judge:

> The prosecution will recommend a Standard Range (ISRB) Sentence, to run concurrent to 08-1-00305-1; Community Custody, Sex Offender Registration Requirements, Restitution and other Legal Financial Obligations Ordered by Court; the prosecutor will also Support, to the extent authorized, a motion to waive PSI requirement.

CP 431. However, when asked if his plea was voluntary, Wallmuller, stated, "Well, yeah, based on the . . . " but was not allowed to finish. Rather the trial court interrupted and spoke for him. "THE COURT: On the advice of counsel, what you've heard, what you thought about, and you're decided on your own to plead guilty today; is that correct?" to which Wallmuller stated, "yes". RP 42 (July 27, 2015).

The court accepted Wallmuller's plea of guilty to the charges after reviewing the declaration of probable cause, determining that Wallmuller had gone over the plea form with his attorney, that he understood the court was

not bound by anyone's recommendation, that he understood the various consequences of his plea and that he was making his plea freely and voluntarily. RP 34-38, 42-43. (June 3, 2014).

On November 17, 2015, the Court of Appeals reversed Mr. Wallmuller's sentence and remanded for resentencing because the trial court did not order a PSI and the state did not prove his offender score. (Court of Appeals of Washington, Division 2. November 17, 2015 Not Reported in P.3d191 Wash.App. 1020).

b. Motion to Withdraw Plea

On June 30, 2015 Mr. Wallmuller filed a motion to withdraw his plea. CP 286-87. Mr. Wallmuller did not assert grounds for his motion in his written pleading. Id. On January 27, 2015 in open court, Mr. Wallmuller presented the following arguments in support of his motion.

First, Wallmuller filed a WSBA complaint against his trial counsel. RP 2 (July 27, 2015). Second, Mr. Wallmuller did not get interviews of the prosecution's witnesses. Id Third, trial counsel told Wallmuller that he should plead guilty because there was no viable defense. RP 2-4 (July 27, 2015). Fourth, trial counsel would not provide Wallmuller with copies of documents from his trial counsel. RP 2-5 (July 27, 2015).

Fifth, Mr. Wallmuller asserted that he did not commit the crimes charged. Sixth, and pleaded and the "videos or whatever in the phone will demonstrate that I didn't have anything to do with anything on January 1, 2016 in Grapeview, Washington." RP 6, 11 (July 27, 2015). Seventh, Wallmuller was waiting for an IT expert report and on other things at the time of his plea, and to date had not seen before pleading guilty. RP 11 (July 27, 2015). Eighth, Wallmuller had ongoing disagreements with trial counsel. RP 13 (July 27, 2015). Ninth, and finally, Wallmuller felt that he had no choice but to plead guilty. RP 13 (July 27, 2015).

On July 27, 206, the trial court entertained and denied Wallmuller's motion to withdraw his plea ruling that Wallmuller had not established a manifest injustice and his plea was knowing, voluntary and intelligent. RP 13-16 (July 27, 2015; CP 238, 266. On August 21, 2016 Wallmuller moved for discretionary review of the trial court order denying his motion to withdraw his appeal. CP 230-250.

C. ARGUMENTS

1. MR. WALLMULLER MUST BE PERMITTED TO WITHDRAW HIS PLEA BECAUSE IT WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT.

Due process requires that a guilty plea be knowing, voluntary and intelligent. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

a. A plea of guilty must be knowing and voluntary.

To be "voluntary in a constitutional sense", the defendant must understand fully his or her legal and constitutional rights and must understand that by pleading guilty, those rights are waived. *State v. Holsworth*, 93 Wn.2d 148, 156, 607 P.2d 845 (1980). Whether a plea is entered voluntarily must be decided by looking at the circumstances. *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983).

The long standing test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S.25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *In re Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987); *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). Under CrR 4.2(d), a court shall not accept a guilty plea "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequence of the

plea."

During the plea hearing when Wallmuller was asked if his plea was voluntary, he was not allowed to answer in full. (June 3, 2014). The trial court instead testified for Wallmuller's by stating in response to its own question: "On the advice of counsel, what you've heard, what you thought about, and you're decided on your own to plead guilty today..." (June 3, 2014).

The court's decision to speak for Wallmuller raises significant issues of voluntariness. Particularly when regarded in conjunction with Wallmuller's concerns about his attorney's ability to prepare a defense, his attorney's refusal to prepare a defense, and the lack of adequate information to permit Wallmuller to intelligently consider his decision. Wallmuller also felt strongly that a video in state custody would have exonerated him. RP 6-16.

Additionally, Had Wallmuller's attorney properly investigated the case and explored a defense for Wallmuller, he would have been able to make a knowing, voluntary and intelligent decision regarding pleading guilty. RP 6-16. The record demonstrates that Wallmuller did not feel adequately informed or that he had a choice in deciding to plead guilty because his

attorney failed to properly investigation. The court also did not permit Wallmuller to answer in his own words whether he was making a voluntary choice to plead guilty. Wallmuller's plea was involuntary and his motion to withdraw his plea should have been granted. Accordingly, this Court should reverse the trial court's order denying Wallmuller's motion to withdraw his plea and remand for a new hearing.

2. DEFENSE COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION TO ENABLE WALLMULLER TO MAKE AN INFORMED DECISION WHETHER TO PLEAD GUILTY, RENDERED COUNSEL'S PERFORMANCE INEFFECTIVE

a. Defense counsel was ineffective for failing to properly investigate the video and for failing to advise Wallmuller about a defense before he pleaded guilty.

To prevail on an ineffective assistance of counsel claim in the context of a conviction following a guilty plea, a defendant must show that defense counsel's representation fell below an objective standard of reasonableness pursuant to the prevailing professional norms, and that but for counsel's unprofessional errors he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d

203 (1985); *State v. A.N. J.*, 168 Wn.2d 91, 111, 225 P.3d 956 2010); *State v. Fedoruk*, 184 Wn.App. 866, 879, 339 P.3d 233 (2014). This Court reviews de novo ineffective assistance of counsel claims which present mixed questions of law and fact. *Fedoruk*, 339 P.3d at 240.

Because "[e]ffective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial," an attorney's failure to adequately investigate the merits of the State's case and possible defenses may constitute deficient performance." *Fedoruk*, 339 P.3d at 239 (*quoting A.N. J.*, 168 Wn.2d at 111). *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir.), *cert. denied*, 117 S.Ct.1 (1996); *see Via v. Superintendent, Powhatan Correctional Ctr.*, 643 F.2d 167, 174 (4th Cir. 1981) (discussing the duties and obligations of defense counsel).

Defense counsel must, "at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." *In re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)); *Fedoruk*, 339 P.3d at 240. An effective counsel must investigate a case and interview witnesses. Id.

In *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003), Johnny Riley

claimed he was denied the effective assistance of counsel because his defense counsel failed to interview a key witness and introduce that testimony at trial. Id. Mr. Riley submitted evidence that his defense counsel never contacted Edward Pettis to interview him about the case, and Mr. Pettis filed a declaration stating he would have testified the victims threatened Mr. Riley before the shooting. *Id.* Citing *Strickland*[1], the *Riley* Court ruled defense counsel:

> "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. We have held that "a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)); *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (counsel's performance was deficient where counsel failed to interview three witnesses who had material evidence as to their client's innocence).

Riley, 352 F.3d at 1818. In reversing his conviction for ineffective assistance of counsel, the *Riley* Court found defense counsel's:

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1 *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> performance fell below an "objective standard of reasonableness" because he failed to interview Pettis. Having never spoken with Pettis, [defense counsel] could not have fully assessed Pettis's version of the events, Pettis's credibility and demeanor, or any other aspect of his involvement that might have reinforced Riley's defense.

Riley, 352 F.3d at 1318-19.

The Court in *Strickland* held that at times "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. In *Riley*, counsel did not follow up with Pettis after Riley told counsel Pettis had been with him when the dispute with Jaramillo and Calloway erupted. And the record does not disclose any reason for the failure of counsel to contact Pettis. Thus, the rule of *Strickland* requiring "reasonable professional judgments" before limiting investigation is offended here. *Riley*, 352 F.3d at 1318-19.

Similarly in Brett, counsel was ineffective for failing to conduct adequate investigation:

> Counsel did not conduct a reasonable investigation into Brett's medical conditions and the possible mental effects of such severe conditions. Thus, Brett's counsel was unable to make informed decisions about

> how to best represent him in both the guilt and penalty phases of the trial.

Brett, 142 Wn.2d at 883. This Court in *Fedoruk* relied on *Brett* to hold counsel ineffective for failing to investigate a mental health defense for Fedoruk. *Fedoruk*, 339 P.3d at 241. Accordingly, before a defense counsel decides to bring a case to trial or advise his client to plead guilty to an offense, a reasonable investigation should be conducted to ensure the client is fully advised and makes an informed decision regarding which action to take.

Based on an objective standard of reasonableness, there is no practical distinction between a failure to investigate a video that could exonerate a defendant and a failure to call a witness or to conduct a mental health or other medical defense investigation when that investigation could provide a viable defense to the charges filed. Here there was no investigation of any possible defense, which as in *Riley*, *Brett* and *Fedoruk*, constitutes ineffective assistance of counsel.

b. Reversal is required because Wallmuller was prejudiced by counsel's deficient performance.

Although the standard for reversing a conviction following a guilty plea based on ineffective assistance of counsel announced in *Hill* is based upon the "general" framework for proving ineffective assistance of counsel

under *Strickland*, the "prejudice" analysis contained in *Hill* is materially different from *Strickland*. To prove ineffective assistance of counsel under *Strickland*, a defendant must show that the result of his trial would have been different. *Strickland*, 466 U.S. at 694. However, when the conviction at issue has followed a guilty plea, the defendant must show that "there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Wallmuller had a potential defense based on the video exonerating him of the charges. The viability of that defense was a jury question. *Hyde v. United States*, 225 U.S. 347, 371, 32 S.Ct. 793, 56 L.Ed.1114 (1912); *United States v. Wooten*, 688 F.2d 941, 946 (4th Cir.1982); *United States v. Grubb*, 527 F.2d 1107, 1109 (4th Cir. 1975). Wallmuller was never given the opportunity to present his colorable defense to the jury because counsel told him to plead guilty after conducting an ineffective and cursory investigation into the circumstances surrounding the incident. Here Wallmuller established that "there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Accordingly, Wallmuller requests this Court find that trial defense

counsel was ineffective, and that but for defense counsel's errors, Wallmuller would not have pled guilty and would have insisted on going to trial. The remedy in this case is to remand for reversal of the guilty plea and for reversal of the denial of the motion to withdraw the guilty plea.

3. THE TRIAL COURT ERRED BY APPLYING THE WRONG LEGAL STANDARD TO WALLMUELLER'S MOTION TO WITHDRAW HIS APPEAL

The trial court abused its discretion in this case by applying the wrong legal standard. A trial court's order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 285 P.3d 27 (2010). A trial court abuses its direction if its decision rested on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015). "Moreover, a court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law'." *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (*quoting, Wash. State Physicians Ins. Exchange & Ass'n. v. Fisons Corp*, 122 Wn.2d 299, 339, 858 P.2d (1054) (1993)).

Wallmuller moved to vacate his plea after sentencing. The trial

court's stated basis for denying Wallmuller's motion to withdraw his plea was his failure "to demonstrate that withdrawal is necessary to correct a manifest injustice." CP 238, 268. This is the standard under CrR 4.2(f)2. CrR 4.2 did not however apply in this case. CrR 4.2(f) provides in relevant part:

> **(f) Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A. 401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. **If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.**

(Emphasis added) CrR 4.2(f). *See also State v. Robinson*, 172 Wn.2d 783, 791 n. 4, 263 P.3d 1233 (2011).

The trial court erroneously relied on the wrong standard in ruling on Wallmuller's motion. *Lamb*, 175 Wn.2d at 128-29. The correct rule of law is CrR 7.8 which provides in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

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2 (former), 2015 amendments do not alter CrR 4.2(f))

> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) The judgment is void; or
> (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8; *Robinson*, 172 Wn.2d at 791 n. 4. The trial court did not consider any of these criteria when she denied Wallmuller's motion. This was an error that requires reversal of the order denying the motion to withdraw. "[M]eeting only the manifest injustice standard of CrR 4.2(f) is insufficient when considering a postjudgment motion to withdraw a guilty plea, and the trial court therefore employed the incorrect legal standard." *Lamb*, 175 Wn.2d at 129.

In *Rafay*, the State Supreme Court reversed a lower court order denying a motion to proceed pro se where the trial court did not articulate the standard used in denying the motion. *Rafay*, 167 Wn.2d at 653-656. The Court held that the trial court abused its discretion because it could not determine if the trial court applied the wrong legal standard. " [I]t may be that it abused its discretion per se based on an erroneous interpretation of law".

Rafay, 167 Wn.2d at 653-656.

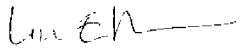
Here, the trial court affirmatively relied on the wrong legal standard when deciding the motion. This was an abuse of discretion "per se". Id. The remedy is to reverse the trial court's order and remand for a new hearing. Id.

D. CONCLUSION

Wallmuller respectfully requests this Court reverse the order denying the motion to withdraw and find that Wallmuller did not make a knowing, voluntary and intelligent decision plead guilty, the trial court abused its discretion in denying the motion to withdraw the plea and counsel was ineffective in assisting Wallmuller with his decision to plead guilty.

DATED this 4th day of May 2016.

Respectfully submitted,



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